LIBRARY
SUPREME COURT

Supreme Court, U.S.
FILED
JAN 18 1972
E. ROBERT SEAVER, CLERK

No. 71-712

In the Supreme Court of the United States

OCTOBER TERM, 1971

REVEREND GENE BRIDGES, ET AL., PETITIONERS

v.

ADMIRAL D. C. DAVIS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
L. PATRICK GRAY, III,
Assistant Attorney General,
ALAN S. ROSENTHAL,
RAYMOND D. BATTOCCHI,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-712

REVEREND GENE BRIDGES, ET AL., PETITIONERS

v.

ADMIRAL D. C. DAVIS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 443 F. 2d 970. The opinion of the district court (Pet. App. 14a-25a) is reported at 311 F. Supp. 935.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1971. A timely petition for rehearing *en banc* was denied on August 27, 1971 (Pet. App. 10a-11a; 445 F. 2d 1401). The petition for a writ of certiorari was filed on November 26, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below properly declined to set aside an order issued by the commanding officer of a Naval Base, which excluded certain civilian ministers from entering the base in the interest of preserving military discipline and morale.

STATEMENT

Petitioners seek review of the dismissal of their action to enjoin enforcement of an order of the commanding officer of the Pearl Harbor Naval Base barring three clergymen from access to the base in the interest of preserving military morale, discipline and good order. The relevant facts are as follows:

1. On August 6, 1969, Rev. Robert Warner opened the doors of the Church of the Crossroads in Honolulu as a sanctuary to some servicemen who were absent without leave from their assigned military stations (Pet. App. 3a). Four days later, Rev. Warner and the AWOL servicemen led a group of approximately 350 people in a march under the name, the "Hawaii Resistance." During the march, Rev. Warner called on other servicemen to join the movement, and urged participants to "resist" any attempt by civilian or military authorities to arrest those who joined. Six additional servicemen entered the Crossroads Sanctuary (Pet. App. 3a). Rev. Warner then issued a statement that about 20 persons would barricade themselves in the sanctuary and protect the fugitive servicemen from arrest (Pet. App. 3a).

The military and civilian authorities refrained

from making any arrests of servicemen at that time. Thereafter, other servicemen entered the sanctuary; on August 17, when the number of servicemen in the sanctuary reached 15, Rev. Warner published an article which stated that those entering the church after the August 10 march "openly defied arrest" (Pet. App. 3a).

By August 22, the number of AWOL servicemen in the Crossroads Church had reached 24 (Pet. App. 3a–4a); three of them were moved to the First Unitarian Church of Honolulu, whose minister, Rev. Bridges, had opened his church as a sanctuary (Pet. App. 4a). Rev. Bridges, who also is an attorney, prepared a document to be signed by those who might be apprehended, which indicated that Rev. Bridges, or some other minister whom he might designate, should have immediate and prompt access to the fugitives in any place where they might be confined (Pet. App. 4a).[1]

In early September, 1969, the military authorities entered the churches and arrested twelve of the AWOL personnel; thirteen others escaped (Pet. App. 4a). Following the arrests, Rev. Warner conducted a service for about nine prisoners in the prison brig. Although he knew that the consumption of wine there was forbidden, Warner permitted a full bottle of wine to be passed among the prisoners, each of whom drank from it (Pet. App. 4a).

Immediately following this service, Admiral Davis, the Commanding Officer of the base, concluded that

[1] A third minister, Reverend Larry Jones, was also actively involved in the Crossroads Sanctuary activity (Pet. App. 5a).

Rev. Warner's overall conduct, both on and off the base, was detrimental to the good order and discipline of the service and decided to bar him from the base. However, before Admiral Davis took that action, he was dissuaded through the intercession of Rev. Bridges who promised to accept "certain areas of responsibility." Bridges, by letter, asked that he be permitted to give religious counselling and conduct services for prisoners and indicated that Rev. Warner and Rev. Jones would be acting under his supervision.

On September 25, 1969, Rev. Bridges held a service in the prison chapel for six prisoners. Although he had been informed of the military authorities' concern with Rev. Warner's lack of ministerial attire when on the base, Rev. Bridges conducted the service in a short-sleeved shirt and trousers. He also smoked, and permitted the prisoners to do likewise, although smoking is not permitted in the prison chapel (Pet. App. 4a–5a).

One soldier who escorted the prisoners to the chapel was so upset by the service that he told his commanding officers he would disobey an order to perform church duties again if the services involved these prisoners; another reacted to reports of the service by assaulting one of the participants. Admiral Davis testified that many such reports reached him, indicating that the service had a disturbing effect on the entire military community. Concluding that the continued presence on the base of the three ministers would have an adverse effect on the morale at the

base, he issued the order barring the three ministers from the base (Pet. App. 5a–6a).

2. The three ministers—Reverends Bridges, Jones and Warner—and several military prisoners brought this action in the district court seeking injunctive relief. After a full trial, the district court, relying on *Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, dismissed the complaint (Pet. App. 26a). The Ninth Circuit affirmed (Pet. App. 13a), and denied a petition for rehearing *en banc* (Pet. App. 10a–11a).

ARGUMENT

1. The court of appeals correctly held that this case is governed by *Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U.S. 886. There the commanding officer barred the plaintiff from a military base for failing to meet security requirements, without affording her a hearing prior to issuing the order. The plaintiff claimed that the order violated her right to due process of law under the Fifth Amendment. Noting a base commander's "historically unquestioned power * * * summarily to exclude civilians from the area of his command", 367 U.S. at 893, this Court rejected the argument (367 U.S. 898):

> We may assume that [plaintiff] could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory—that she could not have been kept out because she was a Democrat or a Methodist. It does not follow, however, that she was entitled

> to notice and a hearing when the reason advanced for her exclusion was, as here, entirely rational * * *.[2]

To permit the courts to reevaluate a base commander's decision that exclusion of particular civilians from the base is necessary to preserve military morale and discipline would involve the judiciary in an area which it is ill-equipped to enter and which necessarily must be largely committed to the discretion of the military authorities. As this Court pointed out in *Orloff* v. *Willoughby*, 345 U.S. 83, 93–94, " * * * judges are not given the task of running the Army. * * * The military constitutes a specialized community governed by a separate discipline from that of the civilian." The fact that the civilians excluded from the military post in this case are ministers of religion does not lessen the post commander's authority to exclude them. He may exclude civilians whose presence causes serious problems for the military, whatever their calling.

2. The base commander had adequate reasons for barring these three ministers from the base. He did so because he concluded that their continued presence would have a detrimental impact on military morale and discipline (Pet. App. 5a). Applicable regulations require a base commander to "promote and safe-

---

[2] In the court of appeals, both the majority and Judge Koelsch concluded that a commander's bar order is subject only to an extremely limited scope of review (Pet. App. 7a, 9a). The only disagreement between the majority and Judge Koelsch involved the application of this settled legal principle to the facts of this individual case—and even then with regard only to one of the ministers concerned.

guard the morale" of the men under his command, and "[e]xert every effort to maintain his command in a state of maximum effectiveness for war service". Navy Regulations, §§ 07020A, 0709.1; Pet. 3. See *Cafeteria Workers, supra.* The ministers' activity in providing sanctuary for AWOL personnel and the disruptive effect of their activities on the base provided ample grounds for Admiral Davis' conclusion that their continued presence would have a detrimental impact on military morale and discipline.

3. There is no conflict among the circuits and, contrary to petitioners' assertion (Pet. 11), there is no "confusion and disarray" regarding the standards for judging the validity of military orders barring from bases civilians who assert the infringement of First Amendment rights. The decisions of all the courts of appeals which have considered the question are in harmony with the opinion below. *Weissman* v. *United States,* 387 F. 2d 271 (C.A. 10); *United States* v. *Cassiagnol,* 420 F. 2d 868, 874 (C.A. 4), certiorari denied, 397 U.S. 1044; *Holdridge* v. *United States,* 282 F. 2d 302, 311 (C.A. 8). See *Government of Canal Zone* v. *Brooks,* 427 F. 2d 346, 347 (C.A. 5); *United States* v. *Jelinski,* 411 F. 2d 476 (C.A. 5), certiorari denied, 396 U.S. 943; *Dash* v. *Commanding General,* 307 F. Supp. 849, 856 (D.S.C.), affirmed on opinion below, 429 F. 2d 427 (C.A. 4), certiorari denied, 401 U.S. 981. Cf. *Koehl* v. *Resor,* 296 F. Supp. 558, 562 (E.D. Va.), affirmed on opinion below, 417 F. 2d 1338 (C.A. 4), certiorari denied, 397 U.S. 1023.

As the court of appeals pointed out in denying the petition for rehearing *en banc* in the present case,

Kiiskila v. *Nichols*, 433 F. 2d 745 (C.A. 7), upon which petitioners rely, is not to the contrary. The issue in *Kiiskila* was whether "an employee of the government" could be "deprived of his employment" merely because he exercised his "right to engage in criticism of governmental policy", 433 F. 2d at 749. The Seventh Circuit noted that it "need not decide whether a civilian not employed on the base could be excluded for the reasons present in this case." 433 F. 2d at 748 n. 4. This case does not involve a discharge from public employment and, in striking contrast to *Kiiskila*, it does not involve a peaceful and legitimate attempt to express views critical of the Vietnam War or the government.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

L. PATRICK GRAY, III,
Assistant Attorney General.

ALAN S. ROSENTHAL,
RAYMOND D. BATTOCCHI,
Attorneys.

JANUARY 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972